

A **BAVANI SAMOGANAZAN v. YANG BERHORMAT MENTERI
SUMBER MANUSIA MALAYSIA & ORS**
HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-139-04-2021]
B 23 DECEMBER 2022

C **Abstract** – *The applicant, a security guard, who has been deprived of
her livelihood under art. 5(1) of the Federal Constitution when she was
terminated from her employment without being informed of the reason for
her failure of the security filtering needed for the purpose of her
employment, must be afforded a fair trial, a concept which necessitates
the observance of the ‘equality of arms’ principle. In placing the
importance of fairness and equality and natural justice, the applicant’s
complaint of unfair dismissal must be referred to the Industrial Court for
adjudication.*
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E **ADMINISTRATIVE LAW:** *Exercise of judicial functions – Certiorari –
Application to quash decision of Minister in refusing to refer applicant’s
representation to Industrial Court for adjudication under s. 20(3) of Industrial
Relations Act 1967 – Dispute between employee and employer – Whether within
purview of Minister to adjudicate on dispute – Whether tantamount to excess of
power – Whether dispute contained questions of facts and law which ought to be
left to Industrial Court to decide – Whether applicant ought to be afforded fair trial
– Federal Constitution, art. 5(1)*
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G **LABOUR LAW:** *Industrial Court – Reference by Minister – Minister’s exercise of
discretion – Dispute between employee and employer – Whether within purview of
Minister to adjudicate on dispute – Whether tantamount to excess of power –
Whether dispute contained questions of facts and law which ought to be left to
Industrial Court to decide – Whether applicant ought to be afforded fair trial –
Federal Constitution, art. 5(1)*

H This was an application for, *inter alia*, an order of *certiorari* to quash the
decision of the first respondent in refusing to refer the representation made
by the applicant to the Industrial Court for adjudication under s. 20(3) of the
Industrial Relations Act 1967 (‘Act’) and for an order of *mandamus* for the
Minister to refer the applicant’s representation to the Industrial Court. The
applicant was working as a security guard for a school (‘school’). As a
security guard, the applicant was required to go through a mandatory security
filtering for the purpose of her employment contract. At the material time,
she had passed the security filtering requirement conducted by the third
respondent. Subsequently, the second respondent took over all contracts
relating to the security guards at the school and the applicant was absorbed
as the second respondent’s employee. The second respondent then took the
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applicant for security filtering at the National Registration Department and thereafter the applicant did not receive any reply. The second respondent handed over a letter of termination of employment to the applicant wherein the applicant was informed that the second respondent had received the decision from the third respondent that the applicant had failed the security filtering and therefore her termination of service would take effect. The applicant then lodged her complaint with the first respondent pursuant to s. 20(1) of the Act. A conciliation meeting was held between the applicant and the second respondent but no settlement was achieved. It was the applicant's position that she was dismissed solely on the ground that the third respondent had decided that she had failed the security filtering and that the second respondent had failed to inquire into the reason for her failure as there was no reason given by the third respondent for their decision. According to the applicant, there were merits in her representation as there were disputes of facts and as such the matter warranted a reference to the Industrial Court for adjudication.

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Held (allowing application):

- (1) The court, in reviewing the decision made by the Minister, is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. There must be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person similarly circumstanced would have arrived at the decision which the Minister had done. (para 15)
- (2) The dispute between the applicant and her employer, the second respondent, could not be resolved by the Minister. The only reason as to why the applicant's employment was terminated was solely on the ground that the third respondent had decided that the applicant had failed the security filtering. In deciding not to refer the applicant's representation merely on the ground that she did not pass the security filtering, the Minister had failed to exercise his discretion in giving effect of settling the dispute. The Minister was merely exercising an administrative duty and not a judicial function and he could not delve into the merits of the dispute and take upon him the determination of the *lis*, which would be tantamount to an excess of the power conferred on him. (paras 16-18)
- (3) The applicant's right to livelihood was affected by the decisions of the second and third respondents and as such the applicant ought to have been given a right to be heard as to why she had failed the security filtering this time around when nothing could be shown that her previous clean record was smeared by any apparent incident. The Minister could not take a short cut route by deciding that the applicant's representation did not warrant a reference to the Industrial Court solely

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- A on the ground that she had failed the security filtering without appreciating procedural fairness which must be adhered to. In exercising his discretion, it was not within the purview of the Minister to adjudicate on the dispute arising between the applicant as the employee and the second respondent as the employer as the dispute herein
- B contained questions of facts and law or mixed facts and law which must be left to the Industrial Court to decide. (paras 21-23)
- (4) Although there is no express provision in the Private Agencies Act 1971 stipulating the duty on the part of the third respondent to give reasons for the failure of candidates in the security filtering, there was a duty on
- C the third respondent to give reasons as to why the applicant did not get through the security filtering as the third respondent's decision had affected the applicant's livelihood. At this juncture, what the applicant was seeking was the reason as to her failure in the security filtering. She was not asking for any confidential document to be disclosed.
- D Furthermore, s. 124 of the Evidence Act 1950 provides that the court may require the head of the department or officer to certify in writing whether or not such disclosure would be detrimental to public interest and if the head of department certified that such disclosure would not be prejudicial to public interest, then the officer shall disclose the communications. (paras 25 & 26)
- E (5) The applicant must be afforded with a fair trial, a concept which necessitates the observance of the 'equality of arms' principle. She could not be shut out from the fair trial solely on the ground that she had failed to fulfil one requirement by the authority for she was deprived of
- F knowing the reason as to why she was said to have failed to fulfil the requirement which she had once successfully passed. The applicant had thus been deprived of her livelihood under art. 5(1) of the Federal Constitution when she was terminated from her employment without knowing the reason for her failure of the security filtering. In placing the
- G importance of fairness and equality and natural justice, the applicant's complaint on unfair dismissal must be referred to the Industrial Court. (paras 28 & 29)

Case(s) referred to:

- Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2007] 2 CLJ 97 FC (*refd*)
- H *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665 CA (*refd*)
- Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36 CA (*refd*)
- Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] 9 CLJ 521 CA (*refd*)
- I **Legislation referred to:**
Evidence Act 1950, s. 124
Federal Constitution, art. 5(1)
Industrial Relations Act 1967, s. 20(1), (3)

For the applicant - SP Devi; M/s A Rajadurai P Kuppusamy & Co

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For the 1st & 3rd respondents - Iznie Elyma Zainal, SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Noorin Badaruddin J:

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[1] This is an application for, *inter alia*, an order of *certiorari* to quash the decision of the first respondent dated 27 January 2021 in refusing to refer the representation made by the applicant to the Industrial Court for adjudication under s. 20(3) of the Industrial Relations Act 1967 and for an order of *mandamus* for the Minister to refer the applicant's representation to the Industrial Court.

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Background Facts

[2] The applicant was working as a security guard since 2009 with a company Wise Star Security Sdn Bhd where she was directed to be stationed at Bukit Bintang 1 and 2 Petaling Jaya, School ("the school").

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[3] As a security guard, the applicant was required to go through a mandatory security filtering for the purpose of her employment contract. At the material time she was informed by the company Wise Star Security Sdn Bhd that she had passed the security filtering requirement conducted by the third respondent.

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[4] On 1 January 2020, the second respondent took over all contracts relating to the security guards at the school and the applicant was absorbed as the second respondent's employee *via* letter of offer dated 1 January 2020.

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[5] The second respondent then took the applicant for security filtering at the National Registration Department in Petaling Jaya around January 2020 and from then on the applicant did not receive any reply.

[6] On 18 April 2020, the second respondent handed over a letter of termination of employment to the applicant wherein the applicant was informed that the second respondent had received the decision from the third respondent that the applicant had failed the security filtering and therefore her termination of service takes effect from 19 April 2020.

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[7] The applicant then lodged her complaint with the first respondent pursuant to s. 20(1) of the Industrial Relations Act 1967 on 12 May 2020. A conciliation meeting was held between the applicant and the second respondent but no settlement was achieved thereafter.

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[8] In February 2021, the applicant received a letter from the first respondent stating *inter alia* as follows:

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- A 2. Dimaklumkan bahawa Y.B. Menteri Sumber Manusia telah memutuskan di bawah subseksyen 20(3) Akta Perhubungan Perusahaan 1967 bahawa representasi mengenai pembuangan kerja tuan/puan tidak wajar dirujuk ke Mahkamah Perusahaan.

Summary Of The Applicant's Contentions

- B [9] Summarily, it is the applicant's position that she was dismissed solely on the ground that the third respondent had decided that she had failed the security filtering and that the second respondent has failed to inquire into the reason for her failure as there was no reason given by the third respondent for their decision. Accordingly, the second respondent is contended to have acted arbitrarily when it decided to rely on the reason provided by the third respondent without due inquiry. The applicant had written a letter to the third respondent to find the reason for rejection but she received no response from the latter.
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- D [10] According to the applicant, there are merits in her representation as there are disputes of facts and as such the matter warranted a reference to the Industrial Court for adjudication.

Summary Of The Respondents' Contentions

- E [11] On behalf of the first respondent, learned Federal Counsel argues that since the applicant has failed the security filtering, it is a clear-cut case that the first respondent's decision in not referring the applicant's representation to the Industrial Court is reasonable.
- F [12] It is argued that there is no injustice caused on the applicant in being terminated from her employment as the second respondent had adhered to the guidelines under the law and there is no question of facts or law that need to be determined by the Industrial Court since the applicant has failed in the security filtering which is a condition for employment of security guards. Further, there is no duty imposed on the third respondent to give reasons as to why the applicant has failed in the security filtering.
- G [13] According to learned Federal Counsel, the security filtering conducted by the Royal Police of Malaysia is classified as official secret and the third respondent is not compelled to disclose the reasons as to the applicant's failure in passing the security filtering process.

H Findings

- I [14] Before making a finding and a conclusion in his decision, the Minister needs to consider all the relevant facts supplied and tendered to him (see *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2007] 2 CLJ 97).

[15] It is trite that the court in reviewing the decision made by the Minister is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. It means that there must be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person similarly circumstanced would have arrived at the decision which the Minister had done (see again *Exxon Chemical (Malaysia) Sdn Bhd (supra)*). A B

[16] It is clear that the dispute between the applicant and her employer, the second respondent cannot be resolved by the Minister. Gopal Sri Ram JCA (as he then was) in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665; [1996] 1 MLJ 481 in referring to the ambit of the Minister's discretion under s. 20 of the Industrial Relations Act 1967 had stated that the first question which the Minister ought to ask is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. Secondly, the Minister has to ask whether the representation objectively speaking is frivolous and vexatious (see: *Hong Leong Equipment Sdn Bhd (supra)*). C D

[17] It is clear that the only reason as to why the applicant's employment was terminated is solely on the ground that the third respondent has decided that the applicant has failed the security filtering. No other reasons were given by the second respondent and no reason was also given by the third respondent as to why the applicant failed the security filtering. E

[18] It is of the considered view that in deciding not to refer the applicant's representation merely on the ground that she did not pass the security filtering, the Minister has failed to exercise his discretion in giving effect of settling the dispute. It must be borne in mind that the Minister is merely exercising an administrative duty and not a judicial function and he cannot delve into the merits of the dispute and take upon him the determination of the *lis*, which will be tantamount to excess of the power conferred on him. F

[19] This court finds that from the applicant's affidavit, there are disputes of facts arising between the applicant and the second respondent as the employer and these facts were placed before the Minister. These disputed facts relate to the real reason as to why the applicant was terminated. G

[20] The applicant has disclosed that she has no previous criminal record and that she has been working as a security guard for more than ten years and prior to the event leading to her termination she had obtained approval from the third respondent to work as a security guard. H

[21] Pertinently, the applicant's right to livelihood is affected by the decisions of the second and third respondents and as such the applicant ought to have been given a right to be heard as to why she had failed the security I

- A filtering this time around when nothing can be shown that her previous clean record was smeared by any apparent incidents except for some kind of displeasure on the part of the second respondent towards the applicant who had lodged police reports relating to some acts of some other co-workers of hers whereby the applicant was asked by the second respondent to withdraw the police report to which the applicant had abide.
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[22] The applicant has further averred that on 17 March 2020 she had received her appraisal from the second respondent indicating that the second respondent was not satisfied with her performance in discharging her duty. Amongst others, the second respondent has stated that the applicant's conduct in reporting straight to the headmaster of the school without the knowledge of the second respondent is amongst the unsatisfactory conduct of the applicant.

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- [23] Having regards to the allegations of facts by the applicant, it is of the considered view that the Minister cannot take a short cut route by deciding that the applicant's representation does not warrant a reference to the Industrial Court solely on the ground that she has failed the security filtering without appreciating procedural fairness which must be adhered to. In exercising his discretion, it is not within the purview of the Minister to adjudicate on the dispute arising between the applicant as the employee and the second respondent as the employer as the dispute herein contain questions of facts and law or mixed facts and law which must be left to the Industrial Court to decide.
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- [24] Even the question as to whether the third respondent is to give reason for its decision as to the failure of the applicant in the security filtering is a question of law which must be addressed by the Industrial Court first. It must be borne in mind that the apex courts have in several recent decisions decided that a decision maker has to give reasons in arriving at his/her decision even in the absence of any provisions in the statute requiring the same as it can be an additional constituent of the concept of fairness (see *Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] 9 CLJ 521; [2021] 2 MLJ 120).
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- [25] In any event, it is of the considered view that although there is no express provision in the Private Agencies Act 1971 stipulating the duty on the part of the third respondent to give reason for the failure of candidates in the security filtering, there is a duty on the third respondent to give reasons as to why the applicant did not get through the security filtering as the third respondent's decision had affected the applicant's livelihood. It must be emphasised that the applicant has no previous criminal record and had obtained approval from the third respondent previously.
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[26] Learned Federal Counsel submitted that the security filtering conducted by the police is classified as secret under the Official Secrets Act 1972 and as such any communication or disclosure of related information is prohibited. It is of the considered view that at this juncture, what the applicant is seeking is the reason as to her failure in the security filtering. She is not asking for any confidential document to be disclosed. Furthermore, s. 124 of the Evidence Act 1950 provides that the court may require the head of the department or officer to certify in writing whether or not such disclosure would be detrimental to the public interest and if the head of department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications (see s. 124 of the Evidence Act 1950).

[27] It is important to note that the Court of Appeal in the case of *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36; [2017] 4 ILR 430, Mary Lim JCA (as Her Ladyship then was) in her illuminating judgment relating to the giving of reasons by the authorities had stated:

... Like the circumstances in *Majlis Perbandaran Pulau Pinang*, the circumstances in the present appeal “to put it mildly, ... were such as to cry out for an explanation ...” from the respondent. Not only does the trend call for an increased openness in matters of Government and administration, it is quite evidently a matter of fairness that the respondent should have given reasons for its decision. Thus, when the learned judge said that he found the decision made under such circumstances, with all the reasons and grounds offered by the appellant to “... not constitute ‘Wednesbury unreasonableness’”, we are entirely perplexed as to how His Lordship could have arrived at such a conclusion. With respect, with and on the reasons and grounds offered by the appellant, and with his wife’s similarly circumstanced application approved, we find that this was clearly a case where the decision reached was quite clearly unreasonable. No reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

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[62] Hence, at the time of rejection of the application as well as the appeals, the non-provision of reasons simply on the ground that there was no duty expressed under the Act and SPP Bil. 4/2003, is certainly injurious to the respondent’s case. In the absence of reasons, having regard to the particular circumstances of s. 12(1) of the Act, we are prepared to say that the respondent in fact, has no valid reason for rejecting the appellant’s application. On that ground alone, the application for *certiorari* ought to and must be granted.

(emphasis added)

[28] It is of the considered view that the applicant must be afforded with a fair trial, a concept which necessitates the observance of the ‘equality of arms’ principle. She cannot be shut out from the fair trial solely on the ground that she has failed to fulfil one requirement by the authority for she is deprived of knowing the reason as to why she is said to have failed to fulfil the requirement which she had once successfully passed.

- A **[29]** At the risk of repetition, the applicant had been deprived of her livelihood under art. 5(1) of the Federal Constitution when she was terminated from her employment without knowing the reason for her failure of the security filtering. In placing the importance of fairness and equality and natural justice, the applicant's complaint on unfair dismissal must be referred to the Industrial Court.
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Conclusion

[30] Premised on the above, the application was therefore allowed.

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